Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1299

FOUR WINDS, INC.,
Petitioner,

vs.

INDIANA AERONAUTICS COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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FOUR WINDS, INC.,
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vs.

INDIANA AERONAUTICS COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, Indiana Aeronautics Commission, respectfully prays this Court to deny issuance of a writ of certiorari to the Indiana Supreme Court, thereby refusing to review the decision entered by that Court in cause number 1276 S 429 on October 31, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana appears at 368 N.E.2d 1340 and is appended to the Petition for Writ

of Certiorari. The Supreme Court of Indiana denied petitioner's Petition for Rehearing and that denial is appended hereto at page A-18. This cause was originally tried in the Superior Court of Marion County, Room No. 5 and the decision of that court is appended hereto at page A-2.

JURISDICTION

Petitioner alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1257(3), ostensibly on the basis of violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. However, Respondent contends that the argument of the petition is directed, not to the United States Constitution, but to alleged contravention of Article 10, Section 1 of the Indiana Constitution by a state statute. Because Petitioner did not seasonably raise the issue regarding Article 10, Section 1 of the Indiana Constitution, the Indiana Supreme Court had no opportunity to decide the question.

Respondent asserts, therefore, that this Court has no jurisdiction to issue the writ prayed for since no real federal issue has been raised, and since the basic issue of the petition has not been properly presented to the State Supreme Court for review.

QUESTIONS PRESENTED FOR REVIEW

The Respondent would assert that the issue presented at this time is whether the Petitioner has properly presented to this Court a federal question of substance.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 10, Section 1 of the Constitution of the State of Indiana reads as follows:

Assessment and taxation.—

(a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal. The General Assembly may exempt from property taxation any property in any of the following classes:

(1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes;

(2) Tangible personal property other than property being held for sale in the ordinary course of a trade or business, property being held, used or consumed in connection with the production of income, or property being held as an investment;

(3) Intangible personal property.

(b) The General Assembly may exempt any motor vehicles, mobile homes, airplanes, boats, trailers or similar property, provided that an excise tax in lieu of the property tax is substituted therefor.

Indiana Code Title 6, Article 6, Chapter 6.5, Section 9 is properly cited IC 6-6-6.5-9 and prior to January 1, 1978, read as follows:

> The provisions of this chapter pertaining to registration shall not apply to the following:
>
> (a) an aircraft owned by and used exclusively in the service of any government or any political subdivision thereof, including the government of the United States, any state, territory, or possession of the United States, or the District of Columbia;
>
> (b) an aircraft owned by a dealer and held solely for purpose of resale. However, the dealer must have complied with the provisions of section 10 of this chapter;

(c) an aircraft owned by a resident of another state and registered in accordance with the laws of such other state. However, the aircraft shall not be exempt from registration if operated within this state for a period of one hundred eighty (180) days or more;

(d) an aircraft upon which this state is prohibited by the constitution or the laws of the United States from imposing the excise tax imposed by this chapter;

(e) an aircraft the owner of which is exempt from ad valorem personal property taxation under the laws of this state; or

(f) an aircraft owned or operated by an air carrier certificated under Federal Air Regulation Part 121 or an aircraft owned or operated by a scheduled air taxi operator who is certified under Federal Air Regulation Part 135 and who is not a resident of this state.

After January 1, 1978, IC 6-6-6.5-9 read as follows:

(a) The provisions of this chapter pertaining to registration and taxation shall not apply to:

(1) An aircraft owned by and used exclusively in the service of:

(i) The United States government;

(ii) A state (except Indiana), territory, or possession of the United States;

(iii) The District of Columbia; or

(iv) A political subdivision of an entity listed in clause (i), (ii), or (iii).

(2) An aircraft owned by a resident of another state and registered in accordance with the laws of that state. However, the aircraft shall not be exempt under this subdivision if it is based inside this

state for a period of one hundred eighty [180] days or more;

(3) An aircraft which this state is prohibited from taxing under this chapter by the constitution or the laws of the United States.

(4) An aircraft owned or operated by a person who is not a resident of Indiana and who is either an air carrier certified under Federal Air Regulation Part 121 or a scheduled air taxi operator certified under Federal Air Regulation Part 135.

(b) The provisions of this chapter pertaining to taxation shall not apply to an aircraft owned by and used exclusively in the service of Indiana or a political subdivision of Indiana. That aircraft must be reported for registration, but the commission will issue the registration without charge.

STATEMENT OF THE CASE

Petitioner initiated this action by filing a complaint for injunction in the Superior Court of Marion County Room No. 5 on February 27, 1976. The complaint is appended hereto at page A-11. The complaint challenges the constitutionality of IC 6-6-6.5-12 and IC 6-6-6.5-13. The complaint does not refer to IC 6-6-6.5-9(e), the statutory provision challenged in the Petition for Writ of Certiorari filed herein. An evidentiary hearing was held on March 9, 1976; and on April 9, 1976, the trial court made findings of fact and conclusions of law and entered judgment. On July 9, 1976, the trial court amended its findings, conclusions and judgment. The Amended Findings of Fact, the Amended Conclusions of Law, and the Amended Order are appended at pages A-2, A-7, A-9. The trial court did not question the constitutionality of IC 6-6-6.5-9(e).

Respondent filed a Motion to Correct Errors in the trial court on August 2, 1976. That motion was overruled on

August 8, 1976. The record of the case was timely filed on October 7, 1976. Respondent filed an Appellant's Brief with the Indiana Court of Appeals on November 3, 1976; and, upon petition by Appellee, the cause was transferred on December 7, 1976, to the Indiana Supreme Court because it involved a constitutional question. Following the granting of a petition for extention of time, Petitioner filed its Brief of Appellee on March 31, 1977. Said brief, which is appended hereto at page A-14, contains no reference to the constitutional issues raised in the Petition for Writ of Certiorari before this Court.

The opinion of the Indiana Supreme Court was rendered on October 31, 1977, and is attached to Petitioner's Writ of Certiorari. A petition for rehearing was filed on November 21, 1977, and is appended hereto at page A-18. The issue regarding IC 6-6-6.5-9(e) and its validity under the Indiana Constitution was first raised in this petition for rehearing which was denied on December 22, 1977. (See page A-1.) Thereafter Petitioner filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO ENTERTAIN THE ISSUES AS RAISED BY PETITIONER IN ITS PETITION FOR WRIT OF CERTIORARI

A. The Petition Fails to State a Federal Question

The Petition for a Writ of Certiorari filed herein states that Petitioner is raising questions of Due Process and Equal Protection under the United States Constitution. The Fourteenth Amendment is set forth in Petition under the topic "Constitutional Provisions Involved". A careful examination of the Petition reveals that two sentences of

Petitioner's argument make general reference to the Fourteenth Amendment. The remainder of the argument is directed to the allegation that the Indiana Aircraft Excise Tax Act of 1975 contravenes Article 10, Section 1 of the Indiana Constitution. The Fourteenth Amendment is used only superficially to comply with Title 28, United States Code, Section 1257(3), under which Petitioner attempts to invoke the jurisdiction of this Court. A mere reference to the Equal Protection clause in order to strengthen other objections to a state statute is not sufficient to invoke the jurisdiction of this Court. *Arbuckle v. Blackburn*, 191 U.S. 405 (1903).

Since the real issue involves interpretation of a provision of the state constitution, the decision is not reviewable by the United States Supreme Court. *Swiss Oil Corporation v. Shanks*, 273 U.S. 407 (1926); *Memphis & C. Ry. Co. v. Pace*, 282 U.S. 241 (1930).

B. The Issue Was Not Timely Presented to the State Court

Assuming, *arguendo*, that the Petitioner's argument regarding Article 10, Section 1 of the Indiana Constitution presented a federal question, it was not timely presented to the state court for decision. Petitioner did not raise this issue until its petition for rehearing following the Indiana Supreme Court decision. (Appendix A-18.) Questions first presented to the highest state court on a petition for rehearing come too late for consideration by the federal Supreme Court on certiorari. *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). It is well settled that the United States Supreme Court will not pass upon a question of constitutionality of a state statute which was not raised in state courts and which those courts had no opportunity to decide. *Adler v. Board of Education*, 342 U.S. 485 (1952); *Beck v.*

Washington, 369 U.S. 541, reh. den. 370 U.S. 965 (1961); *New York ex rel. Cohn v. Graves,* 309 U.S. 308 (1937).

C. The Issue Raised By Petitioner Has Been Rendered Insignificant By the Repeal of the Exemption Challenged

Petitioner alleges that the Act is unconstitutional because a provision of the Indiana Aircraft Excise Tax Act of 1975, IC 6-6-6.5-9(e), exempts from the excise tax all aircraft not subject to *ad valorem* personal property taxation. While it is Respondent's position that Petitioner has grossly misinterpreted the effect of Article 10, Section 1 of the Indiana Constitution as applied to the statutory exemption, Respondent would respectfully point out that subsection (e) of IC 6-6-6.5-9 was repealed by the 1977 Indiana General Assembly. Petitioner's argument is, therefore, rendered devoid of substance and significance. The Supreme Court will not decide issues which have been rendered insignificant by changed circumstances. *Diffenderfer v. Central Baptist Church, Inc.,* 404 U.S. 412 (1971); *Hall v. Beals,* 396 U.S. 45 (1969).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari to the Supreme Court of Indiana should be denied.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF INDIANA

INDIANA AERONAUTICS COMMISSION,
Appellant,

vs.

AMBASSADAIR, INC., and FOUR WINDS, INC.,
Appellees.

Petition for hearing denied this 22 day of December, 1977.

/s/ Richard M. Givan
Chief Justice of the Indiana Supreme Court

IN THE
MARION COUNTY SUPERIOR COURT
Room No. 5

STATE OF INDIANA } SS:
COUNTY OF MARION }

FOUR WINDS, INC. and AMBASSADAIR, INC., *Plaintiffs,*
vs.
INDIANA AERONAUTICS COMMISSION, *Defendant.*

Cause No. S576-233

AMENDED FINDINGS OF FACT

1. Four Winds, Inc., is an Indiana Not-For-Profit Corporation, organized under the Indiana Not-For-Profit Corporation Law, in approximately July of 1975.

2. Further, that Four Winds, Inc., is an air travel club that is based in the Indianapolis area, and operates specifically as a club only to its members.

3. That Four Winds, Inc., operates from Combs Gates hangar at Weir Cook Airport, Indianapolis, Indiana.

4. That even though the Convair 880 operated by Four Winds, Inc., is based at Combs Gates hangar, the aircraft is still out of the State of Indiana, approximately four (4) days of each week of the year.

5. That Four Winds, Inc., operates under a FAA Certificate under Part 123. And, further that all of its operations, as far as crews, aircraft, maintenance, etc., are controlled by the FAA.

6. That the Convair 880, owned by Four Winds, Inc., was built in 1962.

7. That the value of the 1962 model Convair 880 is approximately Two Hundred and Twenty-five Thousand Dollars ($225,000.00), which in fact was the price paid on the lease with option to purchase agreement.

8. That under the provisions of Public Law 68 that were passed by the 1975 General Assembly, Four Winds, Inc., would be required to pay approximately Eighteen Thousand Six Hundred Dollars ($18,600.00) in excise taxes to the Indiana Aeronautics Commission for certification by the State and registration by the State, of said plane for operation during 1976 calendar year.

9. Further, that this tax is based on a maximum landing weight of one hundred and fifty-five thousand pounds (155,000 lbs.) at a twelve cents ($.12) per pound charge under the excise tax provisions of the above-described law during the year of 1976.

10. That under a normal personal property tax assessment that has been previously existing in the State of Indiana, for purposes of taxation, the tax on this Convair 880, 1962 Model, would have been for 1976 due and payable in 1977, approximately Seven Thousand Two Hundred Dollars ($7,200.00).

11. That comparatively, a Lear Jet that would have value of, from anywhere to Four Hundred Thousand Dollars ($400,000.00) to One Million Dollars ($1,000,000.00), and would weigh approximately twelve thousand pounds would only be taxed under said Public Law 68, as passed by the 1975 General Assembly, in the approximate amount of One Thousand Four Hundred Dollars ($1,400.00).

12. That if said Four Winds, Inc., must pay said excise tax in the amount of Eighteen Thousand Six Hundred Dollars ($18,600.00), it would create an undue burden on said Club, in that they are financially unable to pay the same.

13. That said tax in the amount of Eighteen Thousand Six Hundred Dollars ($18,600.00) was due from Four Winds, Inc., on or before February 29, 1976, for registra-

tion and operation of the plane under Indiana State Law during 1976.

14. That as of February 29, 1976, Four Winds, Inc., had not owned or had possession of said aircraft, above described, as the Convair 880, for a period even near one hundred and eighty days (180).

15. Furthermore, neither had Four Winds, Inc., had possession of said aircraft for a period of one hundred and eighty (180) days during the year 1975.

16. That Four Winds, Inc., pays landing fees to Weir Cook Airport each and every time that it lands on said strips, based on the landing weight of the aircraft.

17. That Mr. Henry A. Kezimier is at this time Executive Director of the Indiana Aeronautics Commission.

18. That it is part of the Executive Director of the Aeronautics Commission's duties to propose legislation to the Indiana General Assembly.

19. That Mr. Henry A. Kezimier, Executive Director of the Indiana Aeronautics Commission, had served as General Chairman of the Aviation Association of Indiana, and as a member of the founding Board of Directors of the Aviation Association of Indiana, and had worked with those groups for about seven (7) years to draft this proposed legislation and get it passed in the form of Public Law No. 68.

20. That Mr. Kezimier assisted in the specific drafting and preparation of this particular legislation, as enacted in Public Law No. 68.

21. That during the course of the Legislative Hearings considering the potential passage of this now enacted Public Law 68, there were representatives of the major commercial transport companies, such as TWA, Eastern Airlines and others.

22. That there is an exclusionary section in Public Law 68 that applies to the aircraft owned or operated by an air carrier certified under Federal Air Regulation Part

121. And, further certified under Regulation Part 135. And, further that these are scheduled airlines such as Eastern, TWA, etc.

23. That each of these scheduled airlines, such as Allegheny, North Central, etc., who use the Indiana Airport facilities at Weir Cook Airport more than Four Winds, Inc., but yet are exempted from this taxation under Public Law 68.

24. That it is Mr. Kezimier's decision that the best way to tax airplanes is by weight and age, without any consideration as to cost value, or otherwise.

25. That when this Public Law 68 was enacted by the 1975 General Assembly, as promoted by Kezimier, Four Winds, Inc., and other clubs were not taken into consideration as to facts that they had large aircraft of very heavy weight, but a very small value comparatively.

26. Thus this tax under Public Law 68, as it applies to Four Winds, Inc., is an unfair tax.

27. In the promotion and passage of Public Law 68, there was no consideration given to the use factor, such as the number of flights and take-offs. Furthermore, it was even thought that this at that time was irrelevant.

28. That by passage of Public Law 68 and the enforcement thereon by the Indiana Aeronautics Commission, this effectively punishes Four Winds, Inc., in the further regard that they also pay a landing fee as do other exempt transport planes.

29. That Four Winds, Inc., is punished by a penalty tax or an excise tax for basing its plane in the State of Indiana, at least 180 days a year.

30. That the Airlines of Eastern, Delta, and Allegheny would have between fifteen to twenty (15-20) airplanes in Indianapolis Weir Cook Airport on a given business day. Furthermore, that said airline companies have planes based at Indianapolis Weir Cook Airport, more often than does Four Winds, Inc., even though they do not pay any excise fees.

31. That this excise tax under Public Law 68 is not fair to Four Winds, Inc., and that there is probably an extenuating circumstance where this tax is applied to Four Winds, should be different than applied under the formula.

32. That this excise tax as applied to Four Winds, Inc., is in fact a penalty tax.

33. That during the legislative sessions and committee hearings, none of the private flying clubs, including Four Winds, Inc., was invited to attend the hearings and testify on behalf of or against the proposed legislation, which became enacted as Public Law No. 68. However, the other major transport airlines were present and invited.

34. That in the event the excise tax is not paid on aircraft based in Indiana, then there is an obligation to pay the personal property tax.

35. That the property tax, under Public Law 68, is an alternative tax in the event the excise tax is not paid.

36. That Mr. Kezimier went back to the 1976 General Assembly to seek rectification of Public Law 68 in terms of amending said Law to include the alternative tax clearly as that was the intention from the promoters and authors of said Public Law 68. However, due to the length of the session in 1976, this was unable to be completed.

37. That the imposition of the excise tax under Public Law 68, as applied to Four Winds, Inc., is confiscatory in nature, and imposes a hardship on Four Winds.

38. That Four Winds, Inc., travels in interstate commerce, by virtue of purchasing gasoline, food, beverages, and labor throughout the United States and foreign countries.

/s/ MICHAEL T. DUGAN, II
Judge Marion County
Superior Court Room No. 5

7-9-76

IN THE
MARION COUNTY SUPERIOR COURT
Room No. 5

STATE OF INDIANA } SS:
COUNTY OF MARION }

FOUR WINDS, INC. and AMBASSADAIR, INC.,
Plaintiffs,

vs.

INDIANA AERONAUTICS COMMISSION,
Defendant.

Cause No. S576-233

AMENDED CONCLUSIONS OF LAW

1. That Public Law No. 68 as enacted by the 1975 General Assembly is unconstitutional as in violation of the Fourteenth Amendment of the Constitution of the United States as applied to Plaintiff, Four Winds, Inc., in respect to a taking of its property in a confiscatory manner without due process of law, and further that it is the direct denial of said Plaintiff's right to equal protection of the laws of the United States and of the State of Indiana.

2. That said Public Law No. 68 as enacted by the 1975 General Assembly effectively creates an invidious discrimination as applied to Plaintiff, Four Winds, Inc., and therefore is unconstitutional under the Constitution of the State of Indiana, and further under the Constitution of the United States of America.

3. That said tax is confiscatory as applied to Plaintiff, Four Winds, Inc., that said tax is a penalty tax as applied to said Plaintiff, that said tax is unfair as applied to said Plaintiff, and that said tax is inherently discriminatory as applied to said Plaintiff.

THEREFORE, said tax is unconstitutional as interpreted through the Constitution of the United States and of the Constitution of the State of Indiana, as applied to Plaintiff, Four Winds, Inc.

/s/ MICHAEL T. DUGAN, II
Judge Marion County
Superior Court Room No. 5

7-9-76

IN THE
MARION COUNTY SUPERIOR COURT
Room No. 5

STATE OF INDIANA } SS:
COUNTY OF MARION }

FOUR WINDS, INC. and AMBASSADAIR, INC.,
Plaintiffs,
vs.
INDIANA AERONAUTICS COMMISSION,
Defendant.

Cause No. S576-233

AMENDED ORDER

Comes now the plaintiffs, Ambassadair, Inc., and Four Winds, Inc., by counsel and the defendant, Indiana Aeronautics Commission, by counsel, and the Court having heard evidence under oath on the plaintiff's complaint, having consolidated said hearing without objection, under Trial Rule 65 (A) (2), and having considered defendant's Motion To Correct Errors filed herein, the Court now approved issues

(H. I.)

And further, pursuant to said Amended Findings Of Fact the Court now approved and issued the following Amended Conclusion of Law:

(H. I.)

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, the Public Law 68 enacted by the Indiana General Assembly 1975, IC 1971, 6-6-6.5-13, as applied to these plaintiffs is hereby declared unconstitutional and declared null and void under the Constitution of the State of In-

diana; and further that the preliminary injunction previously herein is now made permanent, and further that the Indiana Aeronautics Commission is hereby enjoined from enforcing the collection of the subject tax in accordance with Public Law 68 as to these plaintiffs.

SO ORDERED this 9th day of July, 1976.

/s/ MICHAEL T. DUGAN, II
Judge Marion County
Superior Court Room No. 5

IN THE
SUPERIOR COURT OF MARION COUNTY
Room No. —

STATE OF INDIANA } SS:
COUNTY OF MARION }

FOUR WINDS, INC.,
Plaintiff,
vs.
INDIANA AERONAUTICS COMMISSION,
Defendant.

Cause No. S576-233

COMPLAINT FOR INJUNCTION

Comes now the Plaintiff, Four Winds, Inc., an Indiana corporation, in person and by counsel, and does hereby file its verified Complaint For Injunction in the words and figures as follows:

1. That Plaintiff is an Indiana Not-For-Profit Corporation, organized and operating a private airplane travel club in the State of Indiana, and more specifically from Weir Cook Airport, Indianapolis, Indiana.

2. That said Plaintiff is the owner of one 1962 Convair airplane Model 880-22M, which is based and operated out of Weir Cook Airport, Indianapolis, Indiana.

3. That the Indiana General Assembly, during 1975, enacted Public Law No. 68, which requires the Aeronautics Commission of the State of Indiana to register and collect an excise tax on all aircraft based in the State of Indiana for 180 days per year or more, beginning with January 1, 1976.

4. That said Convair 880, above described, was acquired by the Plaintiff in this action during the Fall of 1975, for

the approximate price of Two Hundred and Twenty-Five Thousand Dollars ($225,000.00).

5. That under the classification of said excise tax, as published in Public Law 68 in the 1975 General Assembly, said aircraft is presently subject to payment of the excise tax on or before February 29, 1976, in the approximate amount of Eighteen Thousand and Six Hundred Dollars, ($18,600.00).

6. That comparative to other aircraft, with a much greater value, but a lesser weight, the excise tax payment due on those other planes would be substantially less than that due on the plane owned by Plaintiffs in this action, and further would have no relevancy whatsoever to the stated value, nor the number of flights made, nor the use of landing strips at various airports in the State of Indiana.

7. That Sections 12 and 13 of said Public Law 68, as enacted by the 1975 General Assembly, are unconstitutional as being in violation of the Fourteenth Amendment of the Constitution of the United States, in that it effectively deprives the Plaintiff in this action of property without due process of law, and further that it denies the Plaintiff in this action equal protection of the laws, and more specifically the taxation under said laws.

8. And, that Plaintiff further alleges that said Section 12 and 13 of Public Law 68, as enacted by the 1975 General Assembly, is unconstitutional under provisions of the Constitution of the State of Indiana, and further under the Constitution of the United States of America, by virtue that said excise tax as it applies to this Plaintiff would be an arbitrary and capricious application, and an unjust taking of property without any solid basis or foundation upon which said tax was enacted to be fair and equitable to all parties subject to said tax.

WHEREFORE, Plaintiff does hereby pray that a temporary restraining order be issued by this Court against the Aeronautics Commission of the State of Indiana, from enforcing said excise tax at this time, and further be restrained from disallowing said Plaintiff to operate its air-

plane without said registration statement as secured by the payment of said excise tax due February 29, 1976, in the approximate amount of Eighteen Thousand and Six Hundred Dollars ($18,600.00), and further that said Sections 12 and 13 of said Public Law 68, as enacted by the 1975 General Assembly, be declared unconstitutional and in violation of those guaranteed rights as above specified to this Plaintiff, and for all other relief proper in the premises.

BY: GLEN JONES
FOUR WINDS, INC.

STATE OF INDIANA
COUNTY OF MARION } SS:

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 27th day of February, 1976.

BECKY ANN RICHTER
Notary Public

My Commission Expires:
January 30, 1980
JAMES P. QUINN

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IN THE
INDIANA COURT OF APPEALS

No. 2-1076 A 375

INDIANA AERONAUTICS COMMISSION, *Appellant* (Defendant Below) vs. FOUR WINDS, INC. and AMBASSADAIR, INC., *Appellees* (Plaintiffs Below)	Appeal from the Marion County Superior Court Room No. 5 The Honorable Michael T. Dugan, II, Judge

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The plaintiff, Four Winds, Inc., requested an injunction against the Aeronautics Commission of the State of Indiana from refusing to register the aircraft owned by the plaintiff without the simultaneous payment of an excise tax unconstitutionally applying to the plaintiff's aircraft. The Court in effect allowed the plaintiff to continue its otherwise lawful operations under all applicable State and Federal regulations pending the outcome of this question at a hearing on the merits of the complaint.

The cause was heard on March 9, 1976, and the Court held that the statute as applied to the plaintiffs was unconstitutional. The tax specifically exempted all similar commercial operations except the two plaintiffs who were included by oversight as the director of the Indiana Aeronautics Commission readily testified. The tax was directed at the numerous small planes in use for general aviation purposes numbering between five and ten thousand aircraft many of which were avoiding the property tax assess-

ment entirely because they had no readily ascertainable base. The plaintiffs are operated under commercial provisions, and have a fixed and permanent base of operations from which flights are generated on a commercial basis to all parts of the world.

STATEMENT OF THE FACTS

The plaintiff, Four Winds, Inc., is an Indianapolis based flying club serving approximately 3800 members. It operates under specific Federal statutes under similar requirements for airline operations because of the similarity of equipment and function. The Club flys to various parts of the world and regularly schedules trips to Mexico, the Bahamas, the Virgin Islands and other places of interest.

The Indiana Aeronautic Commission prepared the legislation complained of and readily admitted in Court that the application of this tax to the specific plaintiffs in this case was not foreseen or desired and that they were victims of an oversight. The Director of the Commission testified the plaintiff's were not fairly treated by the application of the tax as it was applied by the formula complained of.

The testimony of all the witnesses agreed that the formula was unrealistic as applied to these plaintiffs in comparison with the other five to ten thousand aircraft taxed under the formula, and as to the thousands of commercial aircraft similar to the plaintiff's equipment which was completely exempted.

The testimony of Mr. Kazimier, the director of the defendant at the trial was so clearly and directly supportive of the position of the plaintiff's that no reasonable trier of the facts could have concluded otherwise than that the operation and effect of the tax was both invidious and discriminatory as applied to the plaintiffs. Indeed, nowhere in the transcript does Mr. Kazimier contend otherwise.

SUMMARY OF THE ARGUMENT

In *Wright v. Steers,* 179 N.E. 2d 721, 242 Ind. 582, the Court stated that the nature of a tax must be determined

by its operation and incidence, rather than by its title or designation made by the legislature. In the instant case, the operation of this excise tax had an invidious and discriminatory effect on the plaintiff's. The evidence clearly and overwhelmingly indicated that the two plaintiff's were not treated fairly as compared to all other similar commercial operations that were completely exempted from the tax, and that the sole reliance of the taxing formulas on weight alone was patently ridiculous as applied to the two plaintiff's, and not therefore a reasonable classification for taxing purposes.

ARGUMENT

The application of an excise tax in Indiana can generally not be challenged unless the tax works an invidious and discriminatory harm to the challenger. In this case that is precisely what Ind. Code 6-6-6.6-13 does.

The tax is in lieu of the ad valorem property tax and specifically directs that no aircraft taxable under the excise tax complained of will be assessed a personal property. Code 6-6-6.5-12.

The tax also provides that the excise tax imposed is to be the equivalent of an average property tax rate of nine dollars ($9.00) on each one hundred dollars ($100.00) of taxable value. In the case of the plaintiff's hereunder the tax, because it is related to weight and not value, approximates a rate about double the statutory rate, a *Constitutional Limitation.* 6-6-6.5-22.

The rate therefore, as applied to the plaintiffs is patently unconstitutional by operation of the statutory limitation on the excise tax. Code 6-6-6.5-22. The tax imposed by the excise tax was eighteen thousand six hundred dollars ($18,600.00) as compared to an approximate assessment of seven thousand two hundred dollars ($7,200.00) based on a value of two hundred twenty five thousand dollars ($225,-000.00) for the Convair 880. (TR128).

Mr. Kazimier, the Executive Director of the taxing agency admitted that the tax as applied to the plaintiff,

Four Winds, Inc. was not fair (TR 176-179). This fact is easily perceived from common knowledge, Using age and weight only to tax aircraft is ridiculous if you do not make other reasonable allowances for obvious differences in the classifications employed.

The Court's determination from the record that the tax complained of work an invidious and discriminatory burden on the plaintiff's herein should be clear from a general reading of the evidence in that the classification of Four Winds, Inc. and Ambassadair, Inc. is not reasonable and is arbitrary. Classifying these two planes in a general aviation category where it is obvious they operate in a commercial sense and with clearly commercial equipment is ridiculous.

In *Lutz v. Arnold,* 1935, 193 N.E. 84, 208 Ind. 480 it was held that any classification of the subject of taxation will be valid *if* it rests on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. In this case, it is evident that the Court felt the classification was not valid because it rested on age and weight only and ignored all reasonable basis of actual difference. Ind. Code 6-6-6.6-13 is unconstitutional as applied to the plaintiff, Four Winds, Inc., as working a denial of equal protection of the law in that the classification complained of is arbitrary and unrealistic as readily admitted by the director of the taxing authority itself.

CONCLUSION

The evidence presented in the trial Court clearly supports the findings of that Court and reasonable men could not argue otherwise. Therefore, the appellant has failed to show as a matter of law that the tax complained of is not working an invidious discrimination because such is not possible from any reasonable examination of the record.

Respectfully submitted,
HENRY Y. DEIN

IN THE
SUPREME COURT OF INDIANA

Cause No. 1276 S 492

INDIANA AERONAUTICS COMMISSION, *Appellant* (Defendant Below) vs. FOUR WINDS, INC. and AMBASSADAIR, INC., *Appellees* (Plaintiffs Below)	Appeal from the Marion County Superior Court Room No. 5 The Honorable Michael T. Dugan, II, Judge

BRIEF IN SUPPORT OF PETITION FOR REHEARING OF APPELLEE, FOUR WINDS, INC.

This Court has jurisdiction to modify or amend or vacate its October 31, 1977, opinion and decision upon the filing of the Petition for Rehearing of Appellee, Four Winds, Inc., within the time allowed by Rule AP. 11 of the Indiana Rules of Appellate Procedure. It is also stated in Bobbitt's *Indiana Appellate Practice and Procedure*, Vol. 2, Chapter 62, Page 24:

> "So long as an appeal Court retains jurisdiction of the appeal—and this is until the petition for rehearing is denied or dismissed, or until the time for petition for rehearing has expired, if no petition is filed—it has the authority to change its opinion or revise it in any manner it deems necessary to correct technicalities or change the reasoning or result to see that the law is administered fairly and justice is upheld, either on its own motion or at the suggestion of either party to the appeal."

Appellee contends that the Court in its opinion and decision erroneously overlooked the fact that the Indiana Aircraft Excise Tax Act of 1975, Ind. Code §§ 6-6-6.5-1

through 22 violates Article 10, Section 1 of the Indiana Constitution, which provides as follows:

> § 1. *Assessment and taxation.*—
>
> (a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation of all property, both real and personal. The General Assembly may exempt from property taxation any of the following classes:
>
> (1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes;
>
> (2) Tangible personal property other than property being held for sale in the ordinary course of a trade or business, property being held, used or consumed in connection with the production of income, or property being held as an investment;
>
> (3) Intangible personal property.
>
> (b) The General Assembly may exempt any motor vehicles, mobile homes, airplanes, boats, trailers or similar property, provided that an excise tax in lieu of the property tax is substituted therefore.

This section does not permit an express exemption of any property from the general property tax rate other than that specifically named therein. *Wright v. Steers* (1962), 242 Ind. 582, 179 N.E.2d 721. This section further provides that where property is exempted, such property must be subject to an excise tax in lieu of the property tax.

Not withstanding the foregoing, in addition to a specific exemption for scheduled air carriers, the Act provides as follows:

• • •

> "The provisions of this chapter pertaining to registration shall not apply to the following:
>
> • • •

(e) An aircraft the owner of which is exempt from ad valorem personal property taxation under the laws of this State. . . ."

• • •

[IC 6-6-6.5-9 (e) (Burns 1976 Supp.)].

Appellee, Four Winds, Inc., would respectfully submit that the Court in its opinion overlooked this exemption. In considering such exemption it can only be concluded that the Act must fall as it attempts, in violation of the Constitution, to exempt property other than that set out in Article 10, Section 1, from taxation. *Wright v. Steers,* supra. No class of property can be exempted from taxation unless there is a specific exemption by law. *Stark v. Kreyling* (1934), 207 Ind. 128, 188 N.E. 680. This Court further stated in *Wright*:

"So long as the Constitution reads as it does, the legislature had no authority to exempt from the general property tax any property other than that specifically limited in Article 10, § 1. *Stark v. Kreyling,* supra; the *State ex rel. Tieman, et al. v. The City of Indianapolis* (1879), 69 Ind. 375, 35 Am. Rep. 223; *Miles v. Dept. of Treasury* (1935), 209 Ind. 172, 199 N.E. 372, 101 A.L.R. 1359, Appeal Dism. 298 U.S. 640, 56 S.Ct. 750, 80 L.Ed. 1372. . . ."

[*Wright v. Steers,* 179 N.E.2d, at 725.]

Article 10, Section 1 of the Indiana Constitution clearly states that airplanes may be exempt from the property tax; however, they may only be exempt where an excise tax is substituted in lieu thereof. The Indiana Aircraft Excise Tax Act of 1975, with the exemptions provided, clearly contravenes Article 10, Section 1 of the Indiana Constitution, and, therefore, must fall.

The Court included that the classification contained in the Act is reasonable and does not constitute a denial of equal protection. However, it reasoned, in support of this conclusion that the age-weight formula is defensible in

that it is an index of the extent to which an airplane may be expected to call upon facilities and services provided to the aviation community. However, a classification must be based upon substantial distinctions germane to the subject-matter and object to be attained. *Heckler v. Conter* (1933), 206 Ind. 376, 187 N.E. 878. Notwithstanding, the amount of tax imposed by the Act has no relation to the amount of use the taxable aircraft makes of the facilities benefited.

The Act must be held contrary to the Fourteenth Amendment of the United States Constitution and Article 1, Sections 12 and 23 of the Indiana Constitution if it proposes or results in such inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation. *Dane v. Jackson* (1921), 256 U.S. 589, 65 L.Ed. 1107, 41 S.Ct. 566.

It is patently obvious that exempted aircraft and those paying a substantially smaller tax liability under the Act use airport facilities substantially more than Appellees herein. The testimony in the Trial Court below revealed that scheduled air carriers (exempted aircraft) constitute 95.5% of the total use of airport facilities.

It can readily be seen that Appellees are bearing a tax burden which has no relation whatsoever to benefits received; it, therefore, can only be concluded that Appellees have been denied equal protection of the law and their property was taken without due process of law. See *Wisconsin v. J.C. Penney Co.* (1940), 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267.

It was appropriately stated in *Morton Salt Co. v. City of South Hutchinson* (10th Cir. 1947), 159 F.2d 897, at page 901:

". . . The test of due process, save the Courts, is whether the taxing power exerted by the State bears fiscal relation to . . . benefits given . . . in other words, the query is, what has the State given for which it may ask return. *Wisconsin v. J.C. Penny (sic) Co.,* supra. If the tax imposed

> clearly results in such a flagrant and palpable inequality between the burden imposed and the benefit received that it amounts to an arbitrary taking of property without compensation, it is said to violate the due process guarantee under the Fourteenth Amendment. All of the cases which have affirmed the broad powers of taxation have recognized these limitations, i.e. see *Dane v. Jackson*, supra; *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 614 19 S.Ct. 553, 43 L.Ed. 823; *Houck v. Little River Dist.*, supra Cooley, Sec. 144. . . ."

The result obtained with the rendering of the opinion and decision herein is that Appellees have been denied equal protection and due process of law; and may not own and operate their own aircraft as private persons without being subjected to a severe penalty, furthermore, the Indiana Aircraft Excise Tax Act of 1975 while contravening the Indiana Constitution, Article 10, Section 1, has not been stricken down.

In light of the foregoing, Appellee, Four Winds, Inc., requests that the Court grant a rehearing in the above-entitled cause, and to correct its opinion and decision rendered therein.

Respectfully submitted,

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